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In the Supreme Court of the United States

OCTOBER TERM, 1976

STANDARD OIL COMPANY OF CALIFORNIA, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

MEMORANDUM FOR THE UNITED STATES IN RESPONSE TO MOTION TO RECALL MANDATE OF THIS COURT AND TO GRANT LEAVE TO THE DISTRICT COURT TO CONSIDER A MOTION TO SET ASIDE ITS JUDGMENT FOR FRAUD UPON THE COURT

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In 1972 the United States District Court for the Northern District of California held, after a trial, that the appellant Standard Oil Company of California ("SoCal") had violated Section 3 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 3, by combining and conspiring unreasonably to restrain

and to monopolize the distribution and sale of petroleum products in American Samoa and by entering into illegal requirements contracts with purchasers of those products.[1] *United States* v. *Standard Oil Company of California*, 362 F.Supp. 1331. The district court's judgment enjoined SoCal from continuing or renewing those violations, and also required it to share the use of the only petroleum storage facilities in American Samoa.[2]

In June, 1973, this Court summarily affirmed that judgment. 412 U.S. 924.

One of the findings of the district court was that William R. McCook was a competitor who had been excluded from the market in petroleum products in American Samoa by SoCal's anti-competitive conduct. 362 F. Supp. at 1340. In May, 1974, McCook filed a treble damage suit against SoCal[3] in which, under Section 5(a) of the Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. 16(a), the judgment in the government's suit is "prima facie evidence * * * as to all matters respecting which said judgment * * * would be an estoppel as between the parties thereto * * *."

SoCal has now filed a motion requesting this Court to recall its mandate affirming the district court's 1972 judgment, and to grant the district court leave

[1] On a prior appeal, this Court held that Section 3 of the Sherman Act applies to American Samoa. *United States* v. *Standard Oil Company of California*, 404 U.S. 558.

[2] Petroleum storage facilities on American Samoa are owned by the Government of American Samoa, and after 1956 only SoCal had access to them (App. 760).

[3] *William R. McCook* v. *Standard Oil Company of California, et al.*, C.D. Cal., CV 75-1190 H.P.

to consider a motion under Rule 60(b) of the Federal Rules of Civil Procedure to set aside the judgment for fraud upon that court.[4] SoCal alleges that McCook and his agents produced documents in discovery proceedings in the private suit which they "fraudulently" withheld in the government case, that the chief government counsel was aware of some of those documents before trial but did not produce them despite requests by SoCal, and that he failed to produce before the hearing on relief other documents which the government had received from McCook's agent after the trial and which the district court had requested in connection with the relief proceedings.

For the reasons set forth below, the United States submits that leave of this Court should not be required before SoCal may file its motion in the district court. If, however, the Court concludes that its leave is necessary to file the motion in the district court, the United States opposes the motion insofar as it charges misconduct by McCook and his agents, but consents to the motion insofar as it alleges willful misconduct by government counsel. In any event, the United States opposes the recall of this Court's judgment.

The United States denies SoCal's charges that government counsel participated in suppressing any rele-

[4] In the treble damage case, SoCal requested the district court to deny McCook the *prima facie* effect the judgment in the government suit ordinarily has. That request was denied (Br. 7-9). If leave is granted to file the motion in the district court, CoSal will ask that court to deny any effect to the judgment to McCook (Br. 42, n. 27).

vant documents in the government suit, and in appendices to this memorandum we set forth the facts supporting our position. Our consent to granting SoCal leave to file on this issue is based solely upon the fact that the determination of these charges will require detailed analysis and study of extensive material, which we believe the district court rather than this Court should make in the first instance.

I

A. Although for many years it was well settled that "[f]ederal courts, both trial and appellate * * * would not alter or set aside their judgments after the expiration of the term at which the judgments were finally entered," [5] an exception was made in cases where there was "after-discovered fraud" (*Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 244). Where the judgment sought to be impeached for fraud "had been acted upon by an appellate court," the practice was that leave was required of the appellate court to initiate the proceeding, "because a trial court lacks the power to deviate from the mandate of an appellate court" (*Hazel-Atlas, supra*, p. 248). Although as eminent an authority on federal procedure as the late Judge Charles Clark argued that the thrust of the modern Federal Rules of Civil Procedure toward simplicity and economy makes this

[5] Formal terms for the district courts were abolished in 1948. 62 Stat. 897. See also, 77 Stat. 248; 28 U.S.C. 138, 452.

leave requirement archaic,[6] six of the seven circuits that have decided the question since adoption of the Rules have continued to require such leave.[7]

We have difficulty discerning any compelling reason to continue the leave requirement. Practical considerations counsel against it. The determination whether particular allegations, if proven, would be

[6] *S.C. Johnson & Son* v. *Johnson*, 175 F.2d 176, 183-184 (C.A. 2) (Clark, J., dissenting); *Perlman* v. *322 West Seventy-Second St. Co.*, 127 F.2d 716 (C.A. 2) (dictum).

[7] First circuit: *Wilson Research Corp.* v. *Piolite Plastics Corp.*, 336 F.2d 303, 305; third circuit: *Butcher & Sherrerd* v. *Welsh*, 206 F.2d 259, 262, certiorari denied, 346 U.S. 925; fourth circuit: *Tribble* v. *Bruin*, 279 F.2d 424, 427; sixth circuit: *Home Indemnity Co.* v. *O'Brien*, 112 F.2d 387, 388; seventh circuit: *Geuder, Paeschke & Frey Co.* v. *Clark*, 288 F.2d 1, 4, certiorari denied, 368 U.S. 826 (extending requirement to independent action); eighth circuit: *Hartman* v. *Lauchli*, 304 F.2d 431, 432-433.

Only the tenth circuit has rejected the requirement. *Wilkin* v. *Sunbeam Corp.*, 405 F.2d 165, 166. The second and fifth circuits have considered but not decided the issue. *Doe* v. *Hodgson*, 500 F.2d 1206, 1207 (C.A. 2); *Dickerson* v. *Continental Oil Co.*, 476 F.2d 635, 636 (C.A. 5); *Bros Inc.* v. *W. E. Grace Mfg. Co.*, 320 F.2d 594, 607 (C.A. 5).

In 1955 the Advisory Committee on the Federal Rules of Civil Procedure recommended expressly abolishing the leave requirement, characterizing it as a "useless and delaying formalism," but the amendment was not adopted. See 7 Moore's *Federal Practice* ¶ 60.30[2], p. 429 n. 27 (2d ed. 1975).

Wright and Miller concur in the committee's assessment. 11 Wright & Miller, *Federal Practice and Procedure: Civil* § 2870, p. 269 (1973). Moore, on the other hand, defends the requirement for leave as a means to "screen out attacks that are clearly without merit," and opposes elimination as "unnecessarily undermin[ing] the finality of judgments." 7 Moore, *supra*.

sufficient to reopen an outstanding judgment and, if so, the selection of the appropriate procedures for adjudicating the merits of those allegations are usually matters turning upon the facts and issues in a particular case. As such, they are more appropriately decided initially by the district court, where in many cases the judge hearing the motion will be the one before whom the case was tried and therefore will be thoroughly familiar with its details. As the Court of Appeals for the Tenth Circuit stated, in holding that its leave was not required to file a Rule 60(b) motion for fraud, "the trial court is in a better position to pass upon the issues presented in a motion pursuant to Rule 60(b)." *Wilkin* v. *Sunbeam Corp.*, 405 F.2d 165, 166 (C.A. 10).

The present practice, under which the appellate court makes a preliminary determination whether the allegations are sufficient to warrant consideration by the lower court—which is "not just a ceremonial gesture," *Hazel-Atlas*, *supra*, 322 U.S. at 248—necessarily duplicates the more extensive consideration later made by the district court, and appears to be an unnecessary use of judicial resources. There is no reason to believe that the district courts are incapable of establishing appropriate procedures to weed out unmeritorious motions.[8]

[8] In fact, relief against judgments on certain grounds may also be obtained in independent actions, which are generally not subject to a leave requirement. Restatement, *Judgments* § 144, Comment c. But see *Geuder, Paeschke & Frey Co.* v. *Clark*, *supra* (requiring leave for independent action).

Accordingly, the United States believes that it would be appropriate for this Court to rule that its leave is not required to permit the filing of a motion to vacate for fraud a judgment that it has affirmed.

B. SoCal urges (Br. 10) that this Court not only grant leave to file in the district court, but also recall its mandate.[9] It is neither necessary nor appropriate that the Court take such action.

In *Hazel-Atlas*, which SoCal cites for this requirement (Br. 10), this Court directed the court of appeals to recall its mandate and issue a different one to the district court (322 U.S. at 251).[10] That action, however, was taken only because the Court concluded that the court of appeals' judgment in fact had been procured by fraud and that the ensuing district court judgment entered in compliance with that court's mandate must be expunged. Recall of the mandate in that case thus was necessary to effectuate this Court's decision.

In the present case, however, there is neither need nor occasion for this Court to recall its mandate. If the Court concludes that its leave is necessary before SoCal may file its motion in the district court, it can fully accomplish that purpose by granting leave. When such leave is granted, any subsequent modifi-

[9] A copy of the judgment issued in lieu of a mandate under Rule 59(3) of the Rules of this Court. Such a judgment is the practical equivalent of a mandate. Cf. *Tkaczyk* v. *Gallagher*, 265 F.Supp. 791, 792 (D. Conn.); Fed. R. App. P. 41(a).

[10] Neither of the two other cases SoCal cites suggests that recall is appropriate.

cation or vacation by the district court of its previous judgment would not involve any interference with, deviation from or frustration of this Court's judgment.

The recall of this Court's judgment could suggest that the district court judgment should be suspended until the merits of the motion to vacate have been determined. Such action would be inconsistent with Rule 60(b) itself, which provides that the filing of a motion thereunder "does not affect the finality of a judgment or suspend its operation."

As a result of the district court's judgment (App. 779-780), SoCal is presently sharing with a competitor the bulk petroleum storage facilities on American Samoa. There is no reason to upset this court-ordered relief on the basis of SoCal's unproven allegations.

II

Rule 60(b) of the Federal Rules of Civil Procedure permits a district court, within one year of the entry of judgment, to relieve a party from that judgment for a number of reasons, including newly discovered evidence (Rule 60(b)(2)) and "fraud (whether heretofore denominated intrinsic or extrinsic) misrepresentation, or other misconduct of an adverse party" (Rule 60(b)(3)). Rule 60(b)(6) permits a court to provide similar relief for "any other reason justifying relief from the operation of the judgment," if the motion is made within a reasonable time. Rule 60(b) also states that it does not "limit the power of

a court * * * to set aside a judgment for fraud upon the court." Since the judgment which SoCal seeks to reopen was entered more than a year ago, and is based upon alleged misconduct, SoCal must establish that the misconduct would constitute "fraud upon the court" or some other "extraordinary circumstances" of like gravity that would outweigh the general policy of finality of judgments that Rule 60(b) reflects. *Ackermann* v. *United States*, 340 U.S. 193, 200.

SoCal's claim for relief is based upon two distinct allegations of misconduct, one directed at a third-party deposition witness in the government case and his agents and the other at counsel for the government. First, it contends that prior to the trial of the government's case, McCook, Richard B. Lynn (a lawyer who represented McCook), and Raymond C. Turnbull (a promoter also interested in entering the petroleum business in American Samoa, who sometimes acted as agent for McCook) failed to turn over to SoCal documents in their possession which, SoCal asserts, refuted or substantially weakened some of the government's case. Second, SoCal charges that the government's chief counsel was aware of or possessed copies of the documents, but failed to disclose some of them to SoCal before trial despite its request, and failed to disclose other documents between the judgment and the hearing on relief despite an order of the district court.

As explained below, if this Court concludes that its leave is necessary before SoCal may file its motion in the district court, we oppose leave with respect to

the charges based upon alleged misconduct by McCook, Lynn and Turnbull, but do not oppose leave with respect to the charges based upon alleged willful misconduct by government counsel.

A. The most widely adopted definition of "fraud upon the court" is that of Professor Moore, who says it should

> embrace only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjuding [*sic*] cases that are presented for adjudication. Fraud *inter partes*, without more, should not be a fraud upon the court, but redress should be left to a motion under 60(b)(3) or to the independent action.

7 Moore's *Federal Practice* ¶ 60.33, p. 515 (2d ed. 1975).[11] Examples of fraud on the court include corruption of judges, *Root Refining Co.* v. *Universal Oil Products Co.*, 169 F.2d 514 (C.A. 3), certiorari denied *sub nom. Universal Oil Products* v. *William Whitman Co.*, 335 U.S. 912, or an unconscionable scheme, including the participation of lawyers, to secure and enforce a patent by the fraudulent manufacture of evidence and continuing efforts to prevent discovery of the fraud. *Hazel-Atlas Glass Co.* v.

[11] Such fraud must be proven by clear and convincing evidence. *Brown* v. *Pennsylvania R.R.*, 282 F.2d 522 (C.A. 3); *Consolidated Gas & Equipment Co.* v. *Carver*, 257 F.2d 111, 114 (C.A. 10); *Atchison, T. & S.F. Ry.* v. *Barrett*, 246 F.2d 846, 849 (C.A. 9); *Assman* v. *Fleming*, 159 F.2d 332, 336 (C.A. 8).

Hartford-Empire Co., 322 U.S. 238.[12] Even perjured testimony by a party does not, without more, constitute fraud on the court. *Serzysko* v. *Chase Manhattan Bank*, 461 F. 2d 699, 702 (C.A.2), certiorari denied, 409 U.S. 883; *Petry* v. *General Motors Corp.*, 62 F.R.D. 357, 360-361 (E.D. Pa.); *Lockwood* v. *Bowles*, 46 F.R.D. 625, 631-634 (D. D.C.); cf. *Hazel-Atlas, supra*, 322 U.S. at 245 ("[t]his is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury").

Misconduct by a third-party witness would merely constitute "newly discovered evidence" under Rule 60(b)(2). It would not be fraud upon the court, and would not warrant vacating a judgment under Rule 60(b)(6) when the time for a motion based on fraud by the successful party has expired.[13] See *Klapprott* v. *United States*, 335 U.S. 601, 613; *Simons* v. *United States*, 452 F. 2d 1110, 1115 (C.A. 2); 7

[12] See also *Wilkin* v. *Sunbeam Corp.*, 466 F.2d 714, 717 (C.A. 10), certiorari denied, 409 U.S. 1126; *Serzysko* v. *Chase Manhattan Bank*, 461 F.2d 699, 702 (C.A. 2), certiorari denied, 409 U.S. 883; *Kupferman* v. *Consolidated Research & Mfg. Corp.*, 459 F.2d 1072, 1078 (C.A. 2); *Martina Theatre Corp.* v. *Schine Chain Theatres, Inc.*, 278 F.2d 798, 801 (C.A. 2); *England* v. *Doyle*, 281 F.2d 304, 309 (C.A. 9); *Groves* v. *Witherspoon*, 379 F.Supp. 52, 62 (E.D. Tenn.).

[13] In *Peacock Records, Inc.* v. *Checker Records, Inc.*, 365 F.2d 145 (C.A. 7), relied upon by SoCal (Br. 41), the perjury was allegedly suborned by the successful party, and the Rule 60(b) motion was made within one year after judgment. *Id.* at 146. Thus it was probably based on Rule 60(b)(2) or (3). See *Lockwood* v. *Bowles*, 46 F.R.D. 625, 633 n. 35 (D. D.C.).

Moore, supra, ¶ 60.24[5], p. 291 n. 16. But see *McKinney* v. *Boyle,* 404 F. 2d 632, 634 (C.A. 9), certiorari denied, 394 U.S. 992. Since even perjury by a non-party witness does not constitute fraud on the court, *a fortiori* SoCal's allegation that McCook and his agents failed to turn over to it certain documents in their possession that allegedly would have aided SoCal's case does not constitute such fraud.

SoCal argues (Br. 42) that this case is different from the ordinary case of misconduct by a third-party witness because the judgment in the government suit would have a *prima facie* evidentiary effect in McCook's suit against it. It cites no authority for this distinction, and has shown no compelling reason why the United States should be required to relitigate the entire case at this late date because of misconduct by a third party.[14] The evidence it seeks to impeach affects only one of 68 findings, and only two of eight

[14] In a footnote SoCal cites two cases dealing with relief given to a party to a suit. The first involved relief given under Rule 60(b)(6) on behalf of an adjudicated incompetent, where denial of relief would have involved moving a patient from St. Elizabeth's Hospital in Washington, D.C., near her mother's residence, to California. *District of Columbia* v. *Stackhouse,* 239 F.2d 62 (C.A.D.C.). The second, like *Hazel-Atlas,* involved patent fraud; the plaintiff was denied enforcement of a patent assigned to it by defendant's employee because it had failed to inform the Patent Office of known fraud in the patent application, and thus had "unclean hands." *Precision Instrument Mfg. Co.* v. *Automotive Maintenance Mach. Co.,* 324 U.S. 806, 818-819. Neither case supports the reopening of a final judgment on the basis of fraud by a third-party witness, where the fraud was not known to either of the parties.

victims of SoCal's monopolistic practices (App. 774, ¶ 67); even without those findings the evidence would be ample to support the decree.[15] SoCal has a remedy against McCook: the judgment in the government action is only *prima facie* evidence on McCook's behalf, and SoCal can use its allegedly newly discovered documents to rebut such evidence.

B. The question whether all types of misconduct by a party's attorney constitute fraud on the court under Rule 60(b) is unresolved. The court of appeals for the Second Circuit has indicated that such misconduct is *ipso facto* fraud on the court.[16] On the other hand, our discussion of that subject, *supra,* suggests that a court might well conclude that not all misconduct by a lawyer ordinarily constitutes such fraud.

[15] Even if SoCal had filed a motion under Rule 60(b)(2) within the one-year limit, it could not have prevailed. To set aside a judgment under Rule 59 or 60 on the basis of newly discovered evidence, "it is essential at least that the evidence sought to be introduced is such that it would probably change the result" of the original trial, *Gill* v. *United States,* 184 F.2d 49, 55 (C.A. 2), and is not "merely cumulative or impeaching." *Trans Mississippi Corp.* v. *United States,* 494 F.2d 770, 773 (C.A. 5). Accord, 7 Moore, *supra,* ¶ 60.23[4], pp. 275-276, and cases cited therein. As shown in Appendix B to this memorandum, the new documents SoCal proffers are mostly cumulative, none presents new exculpatory information for SoCal and, indeed, some tend to confirm the district court's original findings.

[16] *Serzysko* v. *Chase Manhattan Bank, supra,* 461 F.2d at 702; *Kupferman* v. *Consolidated Research & Mfg. Corp.,* 459 F. 2d 1072, 1078 (C.A. 2); 7 Moore *supra,* ¶ 60.33, p. 513. Accord, 11 Wright & Miller, *supra,* § 2870, pp. 255-257.

It is unclear whether SoCal is charging government counsel with willful misconduct or merely with negligence. In a hearing on the government's motion for a protective order against a subpoena duces tecum in the private action, the district court asked SoCal's counsel: "[A]re you contending that Mr. Hollander [the government counsel] intentionally suppressed relevant documents?" and the reply was: "We are not contending that, your Honor" (App. 742). Although SoCal suggests (Br. 44) that the judgment in the government case should be set aside even for "negligent suppression" of exculpatory evidence, such conduct would at most support a claim of newly discovered evidence, which is barred by the one-year limitation of Rule 60(b)(2), but not fraud on the court. The cases SoCal cites (Br. 42-46) in which judgments have been set aside because of the government's failure to produce exculpatory material in its possession are all criminal cases which implicate the constitutional rights of the defendant and involve quite different considerations from SoCal's attempt to vacate the judgment in a government civil antitrust suit.

Evaluation of SoCal's charges against government counsel will require a detailed analysis of a substantial amount of documentary material and testimony, involving a careful comparison of the allegedly newly discovered evidence with the evidence at trial. Although we deny SoCal's charges, we believe that the district court rather than this Court should evaluate them in the first instance. "[W]here the facts are

complicated it is often the better course to grant leave and to allow available defenses to be made in answer to the bill" (Mr. Justice Roberts, dissenting, in *Hazel-Atlas*, *supra*, 322 U.S. at 271; footnote omitted). Accordingly, if the Court concludes that its leave is required for SoCal to file the motion in the district court, the United States does not oppose such leave, limited to a claim of willful misconduct by government counsel.

CONCLUSION

The motion for leave to file and to recall the mandate should be denied, without prejudice to the filing of the former motion in the district court. If, however, the Court concludes that its leave is necessary for such filing, leave should be granted, limited to the claim of willful misconduct by government counsel.

Respectfully submitted.

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AUGUST 1976.

APPENDIX A

The Evidence Refutes the Allegations of Misconduct by the United States

(a) Alleged Withholding of Documents Prior to Trial.

SoCal's charge that a government attorney, Bernard M. Hollander, withheld documents given to him before trial is based solely upon the testimony of Raymond Turnbull in November, 1975, that he had given all his documents to Hollander when they first met in October, 1969, and that Hollander took them all to copy (Br. 32-35; App. 556-558, 580, 595).[1] This testimony, however, was taken six years after the event in question, and has many inconsistencies. SoCal itself points to three different answers by Turnbull to the question whether one document had been in his files (Br. 22, n. 23). His entire testimony shows that Turnbull was not testifying to a specific recollection, but from an "assumption," a mental reconstruction of what he thought must have happened (App. 596). He did not recall excluding or withholding anything (App. 607, 611-612). Similarly, Turnbull testified at the outset that he gave Hollander both file folders and loose documents (App. 561), later that he pulled out no loose documents (App. 612), and finally that he may have pulled out file folders and believed that he pulled out separate

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[1] Neither McCook nor Lynn gave any documents to Hollander.

documents, but "I do not remember" (App. 634). He could not remember a single specific file folder that he gave to Hollander (App. 630-637).

In an affidavit (App. 696), Hollander repeated a statement he had made to SoCal's counsel on May 13, 1971, that he could not recall any documents provided to the government by Turnbull which were not marked for identification and turned over to SoCal.

The reliability of Turnbull's present recollection that he turned over to the government all the documents recently produced for SoCal is further weakened by the contemporaneous written record. Turnbull could not recall receiving a receipt from Hollander for the documents he turned over (App. 558). In fact a receipt, dated October 29, 1969, was given (App. 273, 705), and, in addition, Turnbull signed a receipt for Hollander when the documents were returned (App. 274-275, 697). These receipts refer to only three of the ten file folders Turnbull recently produced for SoCal (compare App. 273-275, with App. 234-242, 630-631).[2] Thus, the receipts prepared at that time contradict the testimony of Turnbull that he turned over all his documents to the government.

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[2] The documents the government turned over to SoCal in the government's case correspond to the file titles indicated in the receipts. In addition, the government turned over a letter from McCook to Governor Lee which was obtained through subsequent correspondence between government counsel and Turnbull's counsel (App. 79-80, 271-272, 275, 705). The three files contain correspondence with Union Oil Company (App. 1-19), Governor Lee (App. 20-51), and Summit Industrial Corporation (App. 52-78, 81-100).

(b) Alleged Withholding of Documents Received after Trial, but Prior to Judgment.

After this Court had affirmed the district court's judgment that SoCal had violated the antitrust laws, the court considered the question of relief. SoCal submitted a proposed plan to the district court under which it would share its petroleum storage facilities on Pago Pago Bay. The government solicited the views of potential entrants into the market on SoCal's plan (App. 434-435) and transmitted those views to SoCal and the court (App. 464-470).

Turnbull sent government counsel a letter which commented unfavorably upon SoCal's relief plan (App. 436). The letter urged the development of petroleum storage facilities in Nu'Uli Lagoon, some six miles from SoCal's facilities. Turnbull indicated in the letter that correspondence between himself and Dillingham, a contractor, on the feasibility of the Nu'Uli project was attached. Turnbull's letter was turned over to the district court and SoCal since it contained comments upon SoCal's relief plan (App. 464, 468). The attached documents were not turned over to SoCal because they did not relate to SoCal's relief plan, but instead sought to promote a project that Turnbull had been pushing for a number of years (App. 437-458).

SoCal's present allegation of fraud is based on the government's failure to turn over to it the attachments to the Turnbull letter. The letter itself was admittedly turned over to SoCal. The body of the

letter described the attached correspondence. The existence of the attached documents was also shown by the indication of "14 Enclosures" at the bottom of the letter. SoCal may have mistaken the nature of the documents (Br. 36), and never asked to see them, but that is not evidence of fraud by the United States.

The failure of the United States to turn the documents over did not violate the court's order of October 23, 1973 (App. 462), which covered only comments on SoCal's proposed plan and was designed to enable SoCal to secure copies of letters supporting its position on relief (App. 461-462). The attachments to Turnbull's letter would not have supported SoCal's proposal.

APPENDIX B

An Analysis of the Documents at Issue Indicates that None Contains Information that was Unavailable to SoCal at the Time of the Government's Suit.

The following is an analysis of the documents alleged by SoCal to be significant new evidence. The United States does not consider this analysis to be decisive of the issues presented by SoCal, but offers it to allay any concern that the absence of the documents in the original trial may have affected the result.

SoCal argues that nine of the 67 new documents produced are significantly exculpatory, but its arguments are based on a selective statement of facts and previous evidence. The true significance of the nine new documents which SoCal relies upon can only be appreciated in light of the events which were brought out at the trial. A brief summary of the salient facts is set out below to present a more accurate picture of the nature of the documents which SoCal claims would have shown its innocence.

SoCal had a basic competitive advantage in selling petroleum products in Samoa because it had a fifty-year agreement giving it control of the only existing bulk petroleum tank facilities on the island, at a cost of only a fraction of their real value (App. 760 ¶ 9, 762-763 ¶¶ 17-18).[3] Turnbull, an independent entre-

[3] It also had long-term requirements contracts with major users of petroleum products on the island, which the district

peneur and promoter, attempted to interest at least four oil companies to enter American Samoa (App. 44—Asiatic Petroleum (Shell); App. 51—Unoco, Mobil, and Summit) from 1963 to 1965. McCook was involved only with the Summit Petroleum Company enterprise.

Letters produced in the government suit show that in June, 1964, Turnbull began to correspond with J.T. Shaw, president of Summit, about the sale of petroleum products on Samoa (App. 56), that in October, 1964, Shaw stated that storage tanks were needed (App. 62-64), and that thereafter Turnbull began to seek financing for such tanks (App. 65-68; see App. 50). McCook became involved in this phase of the venture (App. 476) and became its prime owner (deposition of Turnbull, Oct. 1, 1970, p. 207). McCook made a proposal to Governor Lee on August 13, 1965 (a) for McCook to establish a petroleum bulk facility in Pago Pago Harbor, (b) for Oceanic Petroleum Corporation, a Shaw enterprise, to supply the petroleum products and (c) for a new Samoan company, headed by McCook, to buy and sell the products (App. 79-80).

While this project was being planned, Governor Lee and two fish canneries, the other major consumers and

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court found unreasonably restrained trade (App. 776-777 ¶ 7). The existence of these long-term contracts with major local customers lessened the incentive for a potential competitor to invest in major additional storage facilities.

conduits of petroleum products on the island, were seeking other petroleum sources. They considered construction of their own bulk storage facilities as a joint venture, to be operated by the American Samoan Development Corporation. These various activities became known to SoCal, which began to reduce its prices (App. 766).

First, in February, 1965, it initiated a general price reduction, including a reduction in the price of diesel fuel, from 14.95 cents to 13.95 cents per gallon, and then in mid-July, 1965, it reduced diesel fuel prices by an additional two cents for both canneries, retroactive to July 1 (App. 767-768). This reduction was to induce one of the canners, Van Camp Sea Food Company, to agree to reinstate a long-term requirements contract with SoCal (App. 766-767). Van Camp and SoCal agreed to such a contract in principle on July 12, 1965 (App. 767), although Van Camp did not formally accept the contract until February 9, 1966 (GX 26, eighth page).

SoCal withheld the second price reduction from the government of American Samoa until October 25, 1965, in order to induce Governor Lee to sign a long-term requirements contract (App. 768). On that date, SoCal reduced the price for the government to 11.95 cents a gallon, retroactive to Juiy 1, in a meeting at which Governor Lee informed SoCal representatives that he was considering better offers from two other companies. The internal SoCal memorandum describing that meeting ends:

> In our opinion, if the Governor was working under the impression that Van Camp was being

> supplied at $.115, he may have been assuming that this price might be available to him from some other supplier.
>
> At this time, the Governor is absolutely firm in his refusal to sign a contract until he has evaluated other offers. In our opinion, all we can do at this time is to be prepared to move very rapidly with a lower price if we are given the opportunity to do so, or to offer a price of $.115 during our next interview with the hope of stopping any further negotiations with other companies and obtaining a signed contract. [Addendum A]

The significance of the nine new documents presently relied upon by SoCal must be considered in the framework of the foregoing sequence of events.

(1) *McCook's letter to Governor Lee on October 5, 1965* (App. 189). Appellant contends that this would show that McCook was not deterred from entering the market by SoCal's price cuts (Br. 21). A more complete view of McCook's testimony (Addendum B) and the other evidence shows that it was the later, October 25, price reduction to the government, and McCook's ultimate, correct realization that SoCal would better any offer he could make, that finally dissuaded him.

(2) *Governor Lee's letter to McCook of November 16, 1965* (App. 190). Appellant argues that this shows Governor Lee's continued interest in McCook's proposal (Br. 21-22). This argument is inconsistent with appellant's original defense that McCook's proposal died for lack of interest of Governor Lee (App. 735-736), but it does not show continued interest by McCook. Indeed, McCook's terse annotation on the face

of this letter "tell Ray [Turnbull] & file," indicates the contrary.

(3) *Turnbull's letter to Dillingham Corp. on November 24, 1965* (App. 191; Br. 22). This is the letter which SoCal considers most significant among the documents received by the United States after the judgment. SoCal implies that it shows continued interest by Turnbull in McCook's proposal despite SoCal's October, 1965, price reduction. It relates, however, to a development in Tafuna Bay, Nu'Uli Lagoon, a project which Turnbull had been working on independently of McCook since 1963 (App. 437-455). McCook's proposal to Governor Lee expressed a desire "to establish a petroleum bulk facility in Pago Pago Harbor" (App. 79), a different part of the island. In any case, as SoCal admits (Br. 23), Turnbull's continued interest as late as November 15, 1965, well after the October 25 price reduction, had been established by a document produced before trial and introduced into evidence (App. 51). The gravamen of SoCal's complaint is not that the district court was unaware of Turnbull's continuing interest, but that it did not give that factor the weight SoCal attributed to it.

(4) *McCook's Annotation of Governor Lee's Washington office telephone number* (App. 200; Br. 23-24). McCook's telephone call to Governor Lee's Washington office had been previously documented (App. 76) and turned over to SoCal.[4]

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[4] Apparently even in 1970 and 1971 neither McCook nor Governor Lee could remember having had oral communica-

(5) *Briefing document* (App. 221-223; Br. 24). McCook testified that this document was probably prepared by Turnbull before August 13, 1965 (App. 520-521). To the extent that it may reflect Turnbull's understanding of the fish companies' intentions in August, 1965, it is merely cumulative of a later August 25 letter produced in the government suit (App. 76, 521).

(6) *Turnbull's letter to Dillingham Corp. on April 21, 1965* (App. 172-173; Br. 24-25). Appellant argues that this shows that the fishing fleets, major fuel users, were not bound by the canneries' requirements contracts. As such, this evidence is merely cumulative; the district court made stronger findings regarding possible independent action by the fishing fleets (App. 765 ¶¶ 24(a), (b), (e)). Such evidence was simply outweighed by evidence of credit arrangements and a course of dealing which indicated that, as a practical matter, the fishing fleets would buy their fuel through the canneries as long as the price was not excessively unreasonable (App. 5, 70, 82, 261, 769-771 ¶¶ 44, 46-57).

(7) *Turnbull's correspondence with Shell Oil Company, July-August, 1965* (App. 177, 183; Br. 25).

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tion five or six years earlier (App. 484-486, 488-492), much less the substance of any such communication. The new documents show no more than that the Governor asked about the financial strength of McCook's supplier (App. 189). McCook's more recent deposition shows that he has no clear recollection of any conversation with Governor Lee, even after the correspondence was used to refresh his recollection (deposition, Feb. 11, 1976, pp. 622-623) (Addendum C).

These documents confirm rather than rebut the documents produced earlier, which are set forth in Addendum D. They show, as Shell stated to Turnbull on August 5, 1965, that Shell could not compete on the basis of its conventional source of supply (App. 183). Its tentative interest on that date was premised on Turnbull providing an alternative source of supply; there is no evidence that Turnbull ever responded. Despite even later visits and correspondence shown in the earlier record (Addendum E), Shell remained, as the district court found, excluded from the market (App. 763 ¶ 19-19(d), 767-768 ¶ 35, 774 ¶ 67).

(8) *Turnbull's Letter to Paul Gallien of Asiatic Petroleum Corp.* (App. 152; Br. 26). This document is also cumulative. Turnbull's contact with Gallien (or Galeon), and the further fact that Gallien had replied, were known from a letter to Governor Lee produced in the government suit (App. 44).[5]

(9) *Letters between McCook and Governor Lee* (Br. 26-28). For the reasons stated in paragraphs (1), (2), and (4) above, these documents provide no basis for impeachment of any substantive evidence

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[5] Asiatic Petroleum Corp. is a marketing unit in the Royal Dutch-Shell Group. Moody's Industrial Manual 3051 (1971). This was know to SoCal in 1970; in fact two contracts between SoCal and Asiatic (GX 37 and 38) were the basis for the district court's finding that "*Shell* never entered the aviation fuel market in Samoa except by arrangement with SoCal" (App. 763 ¶ 19(c) (emphasis added)). Turnbull was fully cross-examined on the matter in a deposition taken in the government case; SoCal's Appendix excerpt from that deposition is overly selective. See Addendum F.

given in the government suit. Rather, they are inconsistent with SoCal's defense in that suit—that McCook's proposal simply died from lack of interest by Governor Lee (App. 735-736).

Viewing the record below as a whole, none of the documents cited by SoCal presents any information which was unavailable to SoCal at the time of the original trial.

ADDENDUM A

United States v. *Standard Oil Company of California*

N.D. Cal., Civ. No. 52334-SC

GX-39

GX-39

Honolulu, Hawaii
October 27, 1965

MEMORANDUM ON DISCUSSIONS
WITH GOVERNOR LEE

OCTOBER 25, 1965

MR. A. E. STEVENS
San Francisco

On October 25, 1965, Messrs. D. D. Collins and F. B. Goodrich met with Governor H. Rex Lee for the purpose of further negotiations toward finalizing our Samoa power plant products contract. Governor Lee opened by giving us his up to the minute stand on the matter. He stated that he absolutely could not sign a contract with us at this time and it was inferred that he must take this stand regardless of what price we might offer him. He stated that he had received an offer from an independent oil company, the reliability of which had been checked out and proven by his staff, which shaded our offer. Furthermore, a major oil company is currently in the process of presenting a complete proposal to him and that this proposal is expected to be in his hands within 30 days. He further stated that approximately 18 months ago another major oil company presented him with a very attractive proposal which bettered our then arrangement with GAS. That major, however, withdrew their proposal and according to the Governor, their withdrawal was based on some other con-

sideration and not due to economics. Since he has one proposal in hand and expects to receive another complete proposal within 30 days, the Governor feels that he absolutely could not sign with us now because it is his responsibility to bring consumer electricity costs at American Samoa down as much as possible.

At this point, we mentioned that we believed that one time the Government was paying about $.18 per gallon for diesel for their power plant and we wondered if in view of the subsequent reductions the Government had been able to reduce consumer electricity costs. At this, the Governor said that while it is true their diesel cost had gone down considerably since he first arrived in Samoa and that while it is true approximately 70% of their electricity costs is represented by the cost of diesel, they have been unable to make any reductions in consumer costs to date. He stated that he found, upon arriving in Samoa, that the Government was, in fact, subsidizing industry and consumers by charging consumers at a level that did not recover their cost to produce and deliver power. He stated furthermore he found a written contract between the Government of American Samoa and Van Camp whereby the GAS was in essence obligated to give Van Camp a rate that was somewhat less than cost. He did not elaborate. He went on to say that this written contract is no longer in force and that the GAS actually does not know what it does cost to deliver power. He stated that

an accounting study is currently under way and he should know in a relatively short time just exactly what their costs are. He stated that since power consumption has gone up almost fourfold since he arrived, he was reasonably sure that the GAS is no longer selling power at below cost and that if it is proven that the rate is too high after considering not only production costs but also amortization of facilities, he will pass on a rate saving to consumers.

We then asked if the Government of American Samoa was certain that the fuel offered by his other sources was of at least comparable quality to ours. The Governor stated that he as well as his specialists are convinced that the other fuel is of at least and in one case is better in quality than ours. He reiterated that he had checked out the reliability of the other suppliers, stating that sources could be the West Coast, the Far East, and/or the "Straits". He did not elaborate on the latter source but this could mean Indonesia. We then covered briefly our latest offer which entailed a five-year contract for fuel delivered to the power plant at $.1195 per gallon with a 10-year extension when both tanker and shoreside facilities are constructed, with a price reopening clause every 12 months. During this part of the conversation, Governor Lee kept mentioning our price as "eleven nine" and we, after a point, corrected him by saying that our offer was for not "eleven nine" but for "eleven nine five". At this point, the Governor stated that he "candidly was asking us why we

offered him a price that was higher than the price we recently offered to Van Camp". We then told him in terms that could leave no misunderstanding that our current price to both Van Camp and Star Kist is $.1195 per gallon and that at no time was either of the two fishing companies offered a price less than that and furthermore we were able to offer them this price in exchange for their renewing our products contracts. The Governor then stated that he was told by Van Camp (he then changed this to it could have been Van Camp or maybe it was Star Kist) that Standard Oil had offered them a price of "eleven five" and that the notes he had of his conversation with the fishing company which were in the other room would bear him out. However, he said that it was certainly not necessary for him to refer to his notes with our assurance that the fishing companies are not receiving a price of "eleven five".

At this point, we informed the Governor that the price of $.1195 we offered to the fishing companies and the GAS was for the purpose of signing long term contracts. We stated we had negotiated contracts with the fishing companies and they were receiving the $.1195 price. However, because we prefer not to charge the GAS more than we charge the fishing companies, we are effective immediately reducing his price for Samoa Diesel Fuel Special for the power plant by $.02 per gallon or to $.1195 per gallon and that we are making such a reduction without benefit of a contract and the reduction will be retroactive to July 1, 1965.

The Governor seemed sincerely appreciative of our price reduction and asked "can I make an announcement of this new price". We said by all means as the reduction is as we had just stated.

The Governor stated that there was really nothing further that we could do towards negotiating a contract until such time as he has reviewed the offers he referred to at the beginning of our conversation. He did state that it is quite possible nothing may come of them as they may be withdrawn. However, he very emphatically stated that if any other company comes in with a better offer than ours, he will certainly be buying from them, "tomorrow", possibly.

In closing, we asked the Governor that in view of the $.02 per gallon reduction retroactive to July 1, 1965, would he anticipate that any electricity rate reduction could be passed on to the consumers. The Governor stated that he hopes so but it is still too early to tell as his accounting study of electricity costs has not been completed.

As we were leaving, we told the Governor that he would no doubt be hearing from us shortly regarding our bulk plant site lease as it was necessary to and our intention to exercise our next 10-year option on the site. The Governor unhesitatingly stated "Oh, yes, that's right, we do have some negotiating on that, don't we". Nothing more was said regarding our plant site lease but it was apparent that the Governor was well versed with the terms of our lease.

The original—unsigned—Letter Agreement dated October 14, 1965, was left with Governor Lee for his information but no copies of the latest proposed contract were given him.

In the writer's experience since being on this assignment, this is the longest uninterrupted interview we have had with the Governor. He was certainly in an amiable mood and stated several times that he was very candidly expressing his current position. Several efforts were made to determine the exact amount that our offer was being "shaded", however, in each case, although the Governor did not become angry, he would not divulge the exact amount. In our opinion, if the Governor was working under the impression that Van Camp was being supplied at $.115, he may have been assuming that this price might be available to him from some other supplier.

At this time, the Governor is absolutely firm in his refusal to sign a contract until he has evaluated other offers. In our opinion, all we can do at this time is to be prepared to move very rapidly with a lower price if we are given the opportunity to do so, or to offer a price of $.115 during our next interview with the hope of stopping any further negotiations with other companies and obtaining a signed contract.

D. D. Collins

cc: Mr. W. K. Peonce
Mr. C. T. Luscombe

ADDENDUM B

United States v. *Standard Oil Company of California*

N.D. Cal., Civ. No. 522334-SC

Deposition of William R. McCook, March 23, 1971
pages 130-131, 138-140

References:

Identification in deposition	Appellant's Appendix page:
DDX-169	76
letter of August 13	79-80
DDX-138	51

Direct Examination by Mr. Klitguard:

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* * * * *

Q Did you ever get any response to this letter from the governor?

A I think I got a letter from him—no, I don't know if I did or not.

Q Did you get a response from anyone connected with the government of American Samoa?

A I don't remember if I did or not. It seems like something came in.

Q Directing your attention to a letter previously marked DDX 169—well, which is a letter dated August 25, 1965, from Mr. Turnbull to Mr. Shaw, I will ask you if you have seen a copy of this letter before.

A I probably have, I don't remember it.

Q Let me go back for just a minute, Mr. McCook. You said in connection with this August 13th letter that it seemed to you that something came in. I am asking about your response. Do you recall what that was?

A No, I don't.

Q Was it a written document or writing of some kind, a letter?

A I don't recall.

Q Have you looked through your files to see if you have any response?

A Yes.

Q And you don't?

A No, not that I can remember.

Could I go off the record here?

(Whereupon a discussion ensued off the record.)

MR. KLITGAARD: Back on the record.

Q Directing your attention, Mr. McCook, to DDX 169, which is the August 25th letter you have here in front of you, in the first paragraph do you see the statement that Mr. Turnbull had rounded up the fish companies and that they were waiting for the governor to come out here? Do you know if there was a meeting between Mr. Turnbull and the governor after your letter concerning this proposal that you made?

A I think there was. I think that is when I was in Montana and missed it.

Q Do you recall where the meeting was held?

A In Los Angeles some place.

Q Did Mr. Turnbull or anyone report who was present?

A They may have, but I don't remember at all.

Q You don't recall if the canners were present?

A No.

Q Directing your attention to the second paragraph up from the bottom, the reference to Mr. Jerome O'Brien, is he one of the persons that you spoke with back East on your trip to Washington? Your refer to him as head of Union Bank Oil Department and a U.S. NATO oil expert.

A No.

Q Did you speak to Mr. Jerome O'Brien at any time?

A I don't remember. I may have.

Q No recollection?

A No.

Q Directing your attention now to a document previously marked Exhibit 138, which is a letter dated November 15, 1965, from Mr. Turnbull to Governor Lee, I will ask you if you have seen a copy of this document before.

A I may have, but I don't recall.

Q Do you see the third paragraph down, which refers to, "Our agreement with Summit is in effect"?

A Yes.

Q Did you have a written agreement at this point with Summit?

A I don't remember having it, no.

Q Was the agreement oral, then, with Summit?

A Possibly.

Q Let me cover something just with regard to Mr. Shaw, and maybe I've done it before, but I'll cover it now. Did you at any time have any direct dealings with Mr. Shaw, Summit, Oceanic, or any of the Shaw companies?

A No. I think we did cover that a couple of times.

Q Now, what happened after November 15, 1965? Did you make any further proposals to Governor Lee or to GAS for petroleum supply?

A Do you have any records of it here?

Q We have no documents past that date from you.

A If they are not in these files, I evidently did not.

Q Did Mr. Turnbull or anybody ever tell you what happened to your proposal after this date of November 15th?

A Of course they have.

Q What happened?

A Standard Oil lowered the prices and that was the end of our deal—below what we could deliver eventually.

Q The prices were lowered in July of '64.

A I'm sorry. They weren't. Some small segments were.

Q They were lowered with respect to the fishing fleet?

A That's correct.

Q In July of '65; is that correct?

A Yes. Then they started going down on all, as I recall. The airlines were lowered and the diesel fuel for the city.

Q The power plant was lowered?

A Yes, it was lowered, and even the general gasoline prices on the island were lowered, it was my understanding.

Q Who told you that?

A Again, I would assume it had to come from Mr. Turnbull.

Q Did anyone in the canneries or GAS tell you that all these other prices were lowered?

A I didn't visit with them about it.

Q Did you see by how much Standard's prices were lowered?

A No, but it was considerable.

Q Did you know that the final price in 1965, following the price reduction to the government and to the fishing fleet, was 11.95 per gallon for diesel fuel for the fishing fleet?

A No.

Q Did you know that the price for aviation fuel, jet fuel, had been reduced at Governor Lee's agreement to remove the tax on fuel?

A By only that amount, just the tax.

Q There had been a reduction of the tax, plus the price off. Did you know that?

A Well, I knew that the price went down, yes.

Q Did you know how much the price went down?

A I assume it went down three cents, whatever you knocked off it.

Q You are talking about jet fuel now?

A Yes.

Q Did you personally check on what price Standard charged?

A I didn't personally, no.

Q Did Turnbull?

A I'm sure he did.

Q Was the only reason that you abandoned this is that Standard reduced the prices?

A Because we were shot out of the saddle.

Q Explain that.

A We couldn't see any future. We couldn't sell it for as low a price as it appeared to be sold.

Q In your letter to Governor Lee on August 13th you quote a price of 11.25 per gallon for the diesel fuel to the fishing fleet; correct?

A If that is what it says.

Q If Standard was quoting 11.95, wasn't your price lower than Standard's?

A What was it before that?

Q It was 13.95.

A It appears to me like we were fighting a losing battle because that was the first of what could have been several reductions in price. Obviously, I'm in no position to buck Standard Oil, and when Standard Oil reduced their price it did take a lot of sting out of it and evidently the governor might have had some pressure brought to bear. I don't know.

Q Pressure by whom?

A I have no idea, but obviously we weren't in a position to come in on a thin margin and then on a brand new venture have to maybe take another one or two price cuts.

Q Was it your thought that you could get a long-term contract to supply the government power plant?

A Yes.

Q At a specific price?

A Yes, the power plant we thought we could.

Q At a specific price?

A Yes.

Q And so, therefore, you had that business; is that correct?

A We would have had that.

Q Was that business, in your opinion, sufficient inducement for you to come into American Samoa?

A Not quite.

Q What other reasons?

A It was the backbone. There was no doubt about that.

Q In other words, if you got the power plant business, there would have been sufficient inducement for you to come into American Samoa?

A We would want a fair shot at the rest of the business. If we had a fair shot at the rest of the business and the power plant, we certainly would have gone.

Q Well, your price of 11.25 was lower than Standard's price, was it not?

A As I recall, there was some talk about some further reduction by Standard.

Q What talk was that?

A I don't really remember now.

Q Who told you that?

A It must have been Mr. Turnbull. He was doing all my chasing.

Q Did Mr. Turnbull tell you upon what he based that statement about a further reduction by Standard?

A No. I'm not even sure that was the statement made.

Q In other words, you are not sure whether that statement was ever made?

A Not really.

* * * * *

CROSS EXAMINATION

BY MR. HOLLANDER:

Q I think when you started your testimony you said that prices were pretty high in American Samoa and this was one of the inducements for you to get interested in the market; is that correct?

A That is correct.

Q Were they the so-called prices, Standard prices, you were talking about?

A Yes, they were the only people over there.

Q You said also the market could use some competition, you decided; is that correct?

A That's right.

Q Why did you think that?

A Well, just that the prices were awfully high and we felt that competition might stimulate a little growth.

Q If you had gotten a part of the market, as you suggested, do you think you could have made a profit on your investment?

MR. KLITGAARD: I object to the question on the ground it is vague and speculative and calls for matters beyond the witness' knowledge. He hasn't testified to figures, whether it was 50 per cent, 100 per cent or 30 per cent, or what it was.

THE WITNESS: Well, let me just say this, that had I gone ahead with the investment, I certainly would have done it with a profit in mind, and I do know that having just the fuel for the generating plant was not enough to get me too excited to go over

there and make a big investment, having to face some awful—what could be some price cuts and a price war when you are opening up a new business. It is not very inducive to a newcomer.

Q BY MR. HOLLANDER: Did you discuss the possibility that Standard might be in a price war with you?

A Absolutely.

Q Why did you think they could undercut your price?

MR. KLITGAARD: Just a minute, Counsel. There has been no statement here by the witness that Standard could undercut his prices. He doesn't know what Standard could or could not do.

Q BY MR. HOLLANDER: Answer the question.

A Yes.

Q Did it have anything to do with the fact they had the only storage facility on the island?

A That's right.

Q Was that discussed?

MR. KLITGAARD: I am going to object. Was that discussed with—

Q BY MR. HOLLANDER: With anyone in your consideration in going into the market?

A They had the only storage facility?

Q Yes.

A Well, actually, that was more or less the exciting part about it, because we could build our own facility.

Q Did the fact they had the only facility have anything to do with your making up your mind about it? Did the fact that they had a lease on the

only storage facility in Samoa have anything to do in your mind with the threat of a price war by Standard? If so, why?

MR. KLITGAARD: I am going to object to that question because there has been no evidence of a threat of a price war by Standard. Mr. McCook just stated his purpose in coming was to provide competition.

MR. HOLLANDER: Let the witness answer. You know he has a limited time.

MR. KLITGAARD: I am perfectly willing to continue the deposition, Mr. Hollander.

MR. HOLLANDER: Fine. Thank you very much.

Q Go ahead.

A The fact they had the only storage facility, obviously, if you could not provide your own, would limit you. You'd have no chance to do any business over there. But, assuming we built our own facility, even with our own facility I would be reluctant to go in and try to start in business against Standard Oil unless I had some pretty long—or some pretty solid contracts, knowing they could cut the prices and live for many, many years beyond our death, and not face the overall picture.

Q Was there any discussion with anyone at all there about the through put charge that Standard had, compared with the through put charge you would have to have if you put up your own facility?

A There probably was, but I sure don't remember any numbers about anything.

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ADDENDUM C

William R. McCook v. *Standard Oil Company of California*
C.D. Cal., Civ. No. CU 74 1190 HP

pages 616, 618-623 } Deposition of William R. McCook, February 11, 1976
References:

Identification in Deposition	Appellant's Appendix page:
Document 241—Letter of August 13, 1965	79-80
Letter of August 25, 1965	76
Document 276	200
Document 246—Letter of October 5, 1965	189

* * * * *

Q Do you recall whether during the week of August 25, 1965, Mr. Turnbull received a telegram from Governor Lee—

A Well, I—

Q —concerning a proposal?

A It seemed to me there was a telegram. I know there was a phone message that I called Governor Lee around that period of time, but I frankly don't recall talking to him even. Isn't that awful? It's embarassing.

* * * * *

MR. KLITGAARD: I don't recall seeing any telegram after August 13, 1965, either. That is why I am asking the question.

MR. PALMIERI: I don't remember any.

THE WITNESS: I think the only relationship to correspondence was a phone number that I had on a packet to Governor Lee to phone him back in Washington at his temporary office while he was there during that month, which I did, but I don't recall the conversation.

MR. KLITGAARD: Maybe we can clarify that.

MR. PALMIERI: That is a different packet. That would be his documents.

THE WITNESS: Right there.

MR. KLITGAARD: Q I am handing you Document 276. On this there appears to be a telephone number for Governor Lee.

A That's correct.

Q Is this the telephone number you wrote on there when you tried to contact Governor Lee sometime after you sent your August 13th letter?

A Yes.

Q Would this be before the week of August 25th or during that week?

A I wouldn't—that is hard to say, very hard to say.

MR. KLITGAARD: Because I am wondering whether this is what is referred to as the telegram or not.

MR. PALMIERI: I just want to make the observation that I believe that is a Washington number.

THE WITNESS: It is.

MR. PALMIERI: And which I think might shed light on the date.

THE WITNESS: That was the number—that is where he was—where his office was in Washington when he was back there. He shared an office with someone. When I called him, I wouldn't have any idea.

MR. KLITGAARD: Q Would you have called him within a short time after the August 13th letter?

A It would have been then and November.

Q I would like to show you your October 5th letter, which is Document 246. Do you have Document 246 in front of you?

A Yes.

Q Do you see the reference in the first paragraph to a discussion on the telephone?

A Yes.

Q Was that a discussion with Governor Lee in Washington?

A Yes.

Q And was that discussion in connection with this telephone number that you wrote on 276?

A I am sure it was.

Q So the telephone conversation with Governor Lee occurred sometime before October 5, 1965?

A Probably just a day or two before, I would guess, or I am not sure when, but there are—

MR. PALMIERI: You know we have gone through this before, but while you are on the subject, I am going to get you to another telephone conversation which is earlier.

MR. KLITGAARD: Q I would like to direct your attention to Document 241, which is a letter dated August 25, 1965 and which refers to a telephone conversation between you and Governor Lee three days after you sent your letter dated August 13th. Do you see that?

A Yes.

Q Do you recall talking to Governor Lee on the telephone three days after you sent your letter of August 13th?

A No, I don't.

MR. STOUT: Excuse me. I am going to object to the characterization. It says a phone call for appointment with the governor. That doesn't necessarily mean—

MR. PALMIERI: Yes.

MR. KLITGAARD: I will withdraw it.

Q Do you recall calling Governor Lee's office for an appointment with the governor three days after you sent your letter dated August 13, 1965?

A I do recall making an appointment with him when he came back to Los Angeles and we were to meet.

Q Did you talk to the governor directly in making that appointment, or did you talk to his office?

A No. I talked directly to him, I am sure.

Q And was this telephone number that we just looked at here on 276 in connection with that meeting for an appointment?

A I would have to assume it was.

Q Did Governor Lee actually meet with you in Los Angeles?

A No.

Q And then was there some telegram concerning that meeting that was sent to Mr. Turnbull or to you?

A Evidently there was no telegram.

Q I am just asking you for your recollection.

A Well, evidently there was none. I don't recall any.

Q You don't recall any telegram concerning that meeting?

A No.

Q I want to look at 276—

MR. PALMIERI: 297 is the same thing.

MR. KLITGAARD: Q Did you put Governor Lee's telephone number on there before the time that you first called him?

A Well, I'm sure I did. I wouldn't have known it otherwise.

MR. PALMIERI: Wait a moment. He said the first time. There are two calls.

THE WITNESS: Before the first time and only time I called him, you mean?

MR. KLITGAARD: Q You called his office for an appointment, and I take it that was the first time you called him; correct?

A (No response.)

Q Do you want to take a look at the August 25th letter?

MR. PALMIERI: Well, but—

MR. KLITGAARD: Let me just ask the witness.

MR. PALMIERI: The trouble is, you are directing him to two—

MR. KLITGAARD: Yes, and the witness has testified that he called Governor Lee on two occasions—one, to make an appointment, and one in connection with this October 5th letter.

THE WITNESS: Well, I don't recall calling him twice, but maybe I did.

MR. KLITGAARD: Q Was Mr. Turnbull wrong in 241 then when he said that Mr. McCook followed it up with a phone call for an appointment with the governor in Washington?

A You are talking about 11 years ago. I am sure —I know I called him. The conversation I don't recall except that we were having a—tentatively setting up a meeting for—

Q Let's go back. After you sent your August 13th letter to Governor Lee, did you call his office for an appointment to meet him in Los Angeles?

A Yes.

Q And then sometime later after that, did you call Governor Lee again to discuss your supplier's financial strength, which is reflected in this letter No. 246?

A Well, it is possible. It is very possible.

Q In any event, you have a clear recollection of calling Governor Lee the first time to set up the appointment?

A No, I don't have a clear recollection of it at all.

Q Do you have a clear recollection of calling Governor Lee to discuss your supplier's financial strength?

A Not—I do not. Evidently I did, because I referred to it in my letter.

Q Referring to your letter of October 5th?

A Yes.

Q Do you know of any reason why Mr. Turnbull would tell Mr. Shaw that you would call Governor Lee for an appointment if that were not the case?

A No, I don't. I wonder if he could have called him. Is that possible?

Q In a letter from Mr. Turnbull to Mr. Shaw he refers to you calling him. Do you see that?

A Yes.

ADDENDUM D

United States v. *Standard Oil Company of California*
N.D. Cal., Civ. No. 52334-SC

GX-72

GX-139

GX-156

GX-157

GX-207

GX-72

SF 7/1/65 337P /HFJW/

NEW YORK—SPOONER

9858 REURTEL 2549 RE STARKIST AND VAN-KAMP. CONTENTS OF YOUR WIRE DISCUSSED BY A. KELSEY WITH MR. ANTHONY NIZETICH, ASSISTANT TO STARKIST VICE-PRESIDENT, ADMINISTRATION. MR. EVITCH HAD PREVIOUSLY ASKED THAT IN HIS ABSENCE WE TALK TO MR. NIZETICH ABOUT SAMOA. MR. NIZETICH SAID STARKIST HAS NOT PRESENTLY NEGOTIATED LONG-TERM CONTRACT NOR DO THEY INTEND TO SIGN ONE, HE ADDED THAT THEY CONTINUED TO APPROACH STANDARD OF CALIFORNIA FOR BETTER PRICE. HE WAS IN SAN FRANCISCO THE WEEK OF 6/7/65.
TO 6/11/65 TALKING WITH STANDARD OF CALIFORNIA WHO SAID THEY WERE STILL ANALYSING THE SITUATION.
STARKISTS ONLY CONTRACT WITH STANDARD IS FOR THEIR PROCESSING PLANT REQUIREMENT. THIS CONTRACT IS IN EITHER ITS 3RD OR 4TH YEAR OF TEN YEARS. STARKIST'S OBLIGATION IS FOR 60 PCT OF THEIR REQUIREMENTS, NO EXISTING CONTRACT FOR DIESEL FUELS. ON 6/17/65 CONTENTS OF YOUR WIRE CONVEYED TO MR. BEAMON, VAN-KAMP VICE-PRESI-

DENT, PURCHASING, WHO AGREED NOT TO SIGN ANY CONTRACTS PENDING OUTCOME SHELL PACIFIC ISLANDS LTD. NEGOTIATIONS.

AN INTERESTING POINT IN ALL THESE CONVERSATIONS WAS THAT GOVERNOR LEE WHO WAS IN LONG BEACH AREA WEEK OF 6/7/65 FOR JOINT MEETING WOULD NOT MENTION ANY CONTRACT NEGOTIATIONS INVOLVING SHELL OR ANYONE ELSE.

MR. NIZETICH RELATED THAT HE HAD A CONVERSATION WITH MR. BOGDANOVICH, STARKIST CO-ORDINATOR OF SOUTH PACIFIC, APPROXIMATELY FOUR WEEKS AGO. MR. BOGDANOVICH WHO IS STARKIST'S PRESIDENT'S COUSIN, IS STILL IN PAGO-PAGO AND STATED THERE WERE CONVERSATIONS ABOUT THE LOCAL NEGOTIATIONS. PLEASE KEEP US ADVISED.

J. G. FULLER

Line 7 last word / 6/7/65 /

GX-139

LA 10-2-64 850 AM APR

8730 N Y—S GOLDIN

CC—R W CARR—N Y

2498 SF—J H HALL

CC—SF—J G FULLER

WE HAVE INQUIRY FROM GOOD FRIENDS IN THE TUNA PACKING BUSINESS I.E., CHICKEN OF SEA AND STARKIST, IN OUR INTEREST AND ABILITY TO PROVIDE STORAGE, AND MARINE DOCKS FOR 6,000,000 GALLONS DIESEL FUEL PER YEAR AT PAGO PAGO, AMERICAN SAMOA. STANDARD OIL OF CALIFORNIA PRESENTLY ONLY SUPPLIER AND HAVE AS IS THEIR CUSTOM WHEN THERE IS NO COMPETITION BEEN PROVIDING QUESTIONABLE QUALITY FUEL AT EXCESSIVE PRICES/14.95 CPG/. FUEL IS BEING CONSUMED BY JAPANESE TUNA CLIPPERS. JAPANESE FISHERMEN COMPLAINING ABOUT BOTH QUALITY AND PRICE AND ADVISE VAN CAMPS-CHICKEN OF SEA THEY SHOULD BE ABLE TO BUY BETTER QUALITY AT 1½ CPG LESS THAN THEY ARE PRESENTLY PAYING FOR STANDARD OF CALIFORNIA FUEL. WOULD YOU PLEASE ADVISE SOONEST ASSOCIATES INTEREST IN SERVING THESE TUNA

CLIPPERS AT PAGO PAGO. INCIDENTALLY, YOU MAY RECALL SOME FOUR OR FIVE YEARS AGO THERE WAS SOME CONSIDERATION OF EXTENDING THE HONOLULU DIVISION BOUNDARY TO INCLUDE THE AMERICAN FLAG PART OF SAMOA. MAYBE THIS WOULD BE AN OPPORTUNE TIME TO REVIEW THE DESIRABILITY OF U.S. SHELL SUPPLYING AMERICAN FLAG ISLANDS—I.E., HAWAII, PURTO RICO AND AMERICAN SAMOA.

HYNES

GX-156

NY 6-10-65 1.10 PM IJB

SF FULLER

2520 REURTT 8929 / HFJW / RE STARKIST AND VAN CAMP SHELL IS PRESENTLY UNABLE SUPPLY AMERICAN SAMOA.

F. W. SPOONER

June 10, 1965

GX-157

NY 7/16/65 1045AM IJB

SF-FULLER

3496 REURTT 157 HFJW RE STARKIST AND VAN CAMP. WE ARE NOW ADVISED SHELL WILL NOT BE ENTERING AMERICAN SAMOA MARKET. THEREFORE PLEASE ADVISE THESE CUSTOMERS.

F. W. SPOONER

GX-207

To: L.A. Div. Ind. Products

From: R. W. Bowyer

Date: January 28, 1965

Subject: Van Camp Sea Food
International Prospects

Referring to our D-20 correspondence of 12-7-64 your TWX 487 of 1-20-65 about subject.

We contacted Mr. David Hyams on 1-6-65 who indicated no changes or additions to previous conversations regarding India or a proposed plant in the general location of the Marianas Island Group. Further that he would depart for Africa & South America around the 11th of January.

Mr. Hyams did mention that a special executive meeting was going to be held specifically to discuss diesel oil price in Western Samoa & the renewal of an expiring contract with Standard Oil Co.; also that he suggested I contact Mr. Don Doran regarding this subject.

Mr. Don Doran is the new assistant to Van Camp's Vice Pres. of Production and was formerly the manager of Van Camp's operation in Pago Pago.

Contact with Mr. Doran made important points in conversation follow:

1. Renewal of contract with Standard Oil Co. questionable.

2. A ten year products contract written in June 1956 expires June this year. Mr. Doran not completely familiar with contract provisions; we assume contains 30 day renewal clause.
3. Mr. Brian Pitts, representing Royal Dutch Shell group out of either the Fiji Islands or Australia personally talked with Mr. Doran regarding this subject seven months ago.
4. Mr. Pitts secured a sample of Standard's diesel and a lab analysis was performed.
5. The fuel is similar to the Shell diesel fuel presently being sold to Japanese fishing vessels in the Fiji Islands.
6. Total available potential all fuel in American Samoa follow:

   (a) 7 million gallons/yr. fishing fleet fuels—(both Van Camp & Starkist).
   (b) 2 million gallons/year. Diesel generator island electrical service.
   (c) 2 million gallons/year premium diesel fuel —U.S.C. unknown.
   (d) Jet fuels for airlines—we understand Pan American has two flights departing daily. Approximately 2700 miles to Hawaiian Islands.

We also understand that Van Camp's V.P. Purchasing * personally contacted someone locally with Shell regarding above.

(* Mr. Robert Berman)

In conversation with A. T. Kelsey we learned Shell individual contacted was Mr. A. P. Hynes.

Fuels have been barged from L.A. Harbor to Hawaii or approximately 2200 miles. This being the case it might be economical to load from Hawaii & transport to Western Samoa. This of course is a T & S problem since Standard owns the refinery in the Hawaiian Islands.

Because price is the controlling factor & Standard is charging the fleets in Samoa around 15.0 cpg the best approach might be get supply somewhere south of the equator.

In any event please advise the concerned parties that we will be most happy to assist them in their solicitation & negotiation.

/s/ R. W. Bowyer

Carbon Copy to
[Illegible]

ADDENDUM E

United States v. *Standard Oil Company of California*
N.D. Cal., Civ. No. 52334-SC

GX-143

GX-158

GX-210

GX-213

GX-143

MEMORANDUM

Apr. 7 SGUSB

Honolulu, Hawaii
March 29, 1966

COMPETITIVE ACTIVITY SAMOA

MR. A. E. STEVENS
San Francisco

Recently a Shell Oil Company representative visited American Samoa. We are not able to report of his activities during this visit. We have been informed from other sources that Mobil is definitely interested in the American Samoa petroleum market.

It would seem to us that the three companies Governor Lee has asked for proposals in the recent past would be Time, Shell and Mobil.

We will watch this competitive situation very closely and will keep you advised of developments.

/s/ W. H. Ditler
W. H. DITLER

CB:hh

GX-158

R. K. GOSPER

Shell Corner
155 William Street
Melbourne, Vic., 3000

11th November, 1971

Governor John M. Haydon,
Office of the Governor,
PAGO PAGO. American Samoa,

Dear Governor Haydon,

I regret since the receipt of your letter of the 17th August that I have almost continually been out of Australia, as advised by my Development Manager Lionel Bevis in his communication of the 27th of September. Since returning, and particularly in view of your comment in the second paragraph of your letter indicating that you did not wish to issue Government tender bids unless we were interested in the broad construction plan involving market entry as previously presented, I arranged yet again to complete an in-depth economic evaluation of the alternative methods of establishing ourselves in American Samoa.

The alternative studies included—

a) A review of entry along the lines outlined to you in our first formal submission in May, 1970 involving independent fuel discharge wharf, bulk storage facilities for a full range of marketable

products, retail development and participation in the aviation programme with SOCAL.

b) Partial entry involving independent wharf discharge facilities, product storage limited to potential fuel supplies for power station, fishing industry and retail development and a possible joint supply aviation arrangement with SOCAL as first phase; with a second phase in five years aimed at giving us full representation and operational independence.
c) A programme entirely limited to supply of fuel on a CIF basis to the power house in anticipation of securing this Government tender against existing prices; a second phase to follow enabling us a broader basis for competitive representation.
d) A negotiated joint supply programme with SOCAL.

Regrettably with the exception of alternative (d), each of the studies proved unviable, even allowing for the fact that finance for establishing facilities in the Territory is not so readily available now as it was 12 months ago. Once again the main inhibitors were the high cost of capital investment in competing against SOCAL's extremely low cost lease arrangements, SOCAL's shorter supply line and the price levels you currently enjoy.

In the absence of tax benefits, the only way in which we could expect to submit any reasonable proposal to you at this stage would have been on the basis of marginally higher prices than are current for

Government purchases in American Samoa, and this would have been hardly satisfactory to you. You will recall that the original rejection of our tax incentive submission August, 1970 upon which our proposal for entry depended, resulted from your Board's concern for an initial loss of revenue.

The only solution therefore to our continuing effort to put forward an economically acceptable proposition to you at this stage was to reopen negotiations with Standard Oil of California on the subject of a possible joint supply programme, which you will recall from my letter of the 17th of March, 1971 was the then preferred course. Whilst at that time we were compromised because of their involvement in the Government's Anti-trust suit relating to their petroleum marketing activities in American Samoa, we had recently learned that the suit had been dismissed by the U.S. District Judge in San Francisco for apparent lack of jurisdiction on a technical point, namely, that American Samoa "as an unorganised possession" was not a "Territory" within the meaning of such term in Section 3 of the Sherman Anti-trust Act.

Not anticipating that the Justice Department would exercise the right to appeal this decision to the U.S. Supreme Court, I obtained my London principal's agreement to arrange for myself to have discussions in San Francisco with Standard Oil on the matter of a joint entry programme. In the expectancy that these talks would form the basis for a sensible ar-

rangement, it was then my intention to come back through Pago Pago to seek your approval as originally requested by you.

Unfortunately, this intended meeting was completely compromised by the fact that we were advised a meeting was inappropriate because the U.S. Government had decided to exercise its right of appeal to the U.S. Supreme Court on the ruling handed down by the San Francisco District Judge. Understandably SOCAL have once again found themselves in a position of not being able to negotiate with us.

I have no alternative, Governor Haydon, as a result of the above to advise you that at this stage we are not in a position to invest in American Samoa and believe that the earliest opportunity for review will be dependent upon termination of the Anti-trust suit against SOCAL, after which we would expect to be in a position to negotiate with them.

There has been no rejection to date of a joint supply concept by them on any other basis than the constraint of the current Anti-trust suit. I am particularly sensitive to the sustained efforts on the part of your Government and certain officers in working towards a possible means of enabling our entrance as oil marketers in the Territory; indeed we have ourselves expended considerable effort and finance in seeking a solution. However, I was not prepared to finally request the issue of Government tender bids until we had again reviewed our homework to see whether the numbers would work. I also firmly be-

lieve that if Standard Oil had not continued to be involved in a legal matter concerning the Territory, by now we may well have been on the way to establishing ourselves in American Samoa and introducing the desirable benefits of a competitive petroleum market in the Territory.

In concluding, may we assume that at a time in the future when negotiations with Standard Oil are possible and prove effective, that you will be acceptable to us re-opening talks with you on such matters as wharfage site and land for our facilities.

Thank you again for your continued co-operation.
Kind regards,

/s/ Kevin C

GX-210

FORMAL REQUEST TO THE GOVERNOR
BY SHELL COMPANY (PACIFIC ISLANDS)

LIMITED
TO ENTER AMERICAN SAMOA
Wednesday 6th May, 1970

L. T. Frogatt
Attorney for:—

SHELL COMPANY (PACIFIC ISLANDS) LIMITED.

Shell Corner
155 William Street
Melbourne, Vic. 3001

RKG:GM

4th May, 1970 — CONFIDENTIAL

Governor John M. Haydon,
Office of the Governor,
PAGO PAGO. American Samoa.

Dear Governor Haydon,

FORMAL REQUEST TO ENTER AMERICAN SAMOA

I have pleasure in submitting a formal proposal, on behalf of Shell Company (Pacific Islands) Limited, seeking your approval to enter American Samoa for the purpose of marketing petroleum products.

Our capacity to submit the following proposal has resulted from exchanges of communication and in particular I refer to our letter of the 22nd December, 1969 and your reply of 8th January, 1970, and subsequent discussions during our visitations to Pago Pago in which you and your staff have given such considerable assistance and encouragement to the project. Integral to our proposal is our capacity to enter into lease of those packages of land described in the agreement between the Government of American Samoa and Shell Company (Pacific Islands) Limited granting "first right of refusal" and entered into on the seventeenth day of February 1970. Whilst this agreement is due to expire on the 16th May, we would also presume its continuance beyond this date if a decision on our proposal had not been reached by that time, until such time as we received your acceptance or otherwise. We would further seek your agreement to our rights to acquire additional land inclusive of that certain parcel of land at Satala whose ownership is disputed between the Grove Family and the Government of American Samoa and the land lying further west which we understand to be privately owned by members of the Grove Family. Our reason for requesting this right of acquisition is to ensure we have the capacity for expansion as the Territory needs for petroleum products increase. We would also seek your agreement in principle to acquire by lease, or otherwise, any other area of land for the conduct of our business in the Territory such as is required for the establishment of retail or indus-

trial outlets providing of course that such applications meet with your approval.

The subject of annual rental has been discussed and appropriate rental rates will be negotiated concurrent with the submission of this proposal. We would also seek your clarification on the general lease conditions which may apply to the areas under option.

Proposed Timetable for Entry

Subject to your agreement we would plan to commence the construction of our main storage and wharf facilities in Pago Pago Harbour, and our Aviation storage and servicing facilities at Tafuna, in November of this year, 1970, with a view to commencing the marketing of ground products by the end of the second quarter of 1971. This programme represents a deferrment of approximately six months from the original indications given you at discussions late last year, but results from the up-start time we would require, and the fact that we cannot anticipate to be in a position to bid competitively for American Airlines business, which continues to be a critical element of the economics of our entry, before December 1971. This point is elaborated on further in the sub section under Airline Business. A further qualification on this timing programme could be your decision on future supplies for fuel needs in respect of your Power House complex, bearing in mind our awareness of a survey completed by Mr. C.T. Crowley of the Rural Electrification Authority of the De-

partment of Interior of the United States on which we also later comment.

CAPITAL INVESTMENT

We would plan to invest capital to the value of US $1.5 million along the following lines:—

(a) Main storage installation comprising the following tankage and product handling facilities:	
1 x 2,400 ton tank for Aviation Turbine Fuel	
1 x 4,600 ton tank for "Samoan" Diesel Fuel	
1 x 520 ton tank for Motor Gasoline	
1 x 520 ton tank for Distillate	
T-head jetty and mooring dolphins for general purpose tanker (approximately 22,000 dead weight tons) discharge.	US$1,032,000
(b) Airfield storage and hydrant dispensing system at Tafuna Airport	US$ 110,000
(c) Retail and Industrial Outlet Development	US$ 168,000
(d) Transport and Distribution	US$ 144,000
(e) Accommodation	US$ 58,000
	US$1,512,000

Construction Concept

As previously discussed, we would propose to develop this project in conjunction with your Public Works Department using their services in respect of civil and building works. We would plan to employ a contractor to handle the mechanical and general management aspects of the development with Shell to provide a Project Superintendent for co-ordination and supervision. This Superintendent would be on site during the whole of the programme to ensure that adequate liaison was maintained with all interested parties, that works were completed in accordance with our normally accepted practices and that financial commitments were met.

Integral and coinciding with our submission we have arranged for our Projects Manager Mr. L.R. Kinsley to be present in Pago Pago to enable follow up discussions with your Director of Public Works and in particular Mr. W. Keener with whom earlier exchanges were held. We would hope to confirm during these discussions that:—

(a) Our cost projections incorporating P.W.D. are realistic and consistent with previous communications.

(b) Our concept of the tanker discharge berth and fishing fleet bunkering facilities are consistent and follow previously considered cost and erection methods.

(c) The layout for the main storage facility meets with your agreement and is consistent with P.W.D. drawings of the area.

In proceeding with the erection of storage and hydrant facilities at the airport along the lines previously negotiated, it is important for us again in discussions with your P.W.D. staff to:—

(a) Outline our storage and supply concept.
(b) Ensure our use of separate hydrant trench and outlets from SOCAL.
(c) Ensure that our planning is consistent with the Territory long term airport planning which we know to be currently under study.

Arising out of the above we would proceed to forward final drawings and detailed plans, in line with the examples submitted for discussion with this proposal, to your Public Works Department. These plans will relate to the main storage area, the wharf and distribution area, and the aviation storage and servicing requirements at Tafuna Airport.

Distribution Concept

The storage, packing, handling and distribution of products will initially locate on that land adjacent to the wharf discharge facility but in due course as conjoint general wharf expansion development takes place, our relocation would need to be integrated with the cost of such a programme and appropriate land such as that described in paragraph one would need to have been satisfactorily acquired.

Our method of supply and distribution is planned to make maximum use of pipelines to remove road usage pressures and is as follows:—

(a) Road vehicles for Retail and Industrial outlets.
(b) Road bridger for supplies to Tafuna Airport.
(c) Use of pipelines for supplies to the fishing fleet.
(d) Use of pipelines where feasible for canning industry needs.
(e) Use of pipelines for general purpose marine bunkering.
(f) Potential use of pipeline in respect of Electricity generating plant business.

GOVERNMENT ASSISTANCE

During the course of our negotiations with you and your staff, we have openly revealed our main concerns qualifying acceptable economics to our potential entry. These related to:—

(a) The potential land restraints for establishing our facilities.
(b) The need to establish separate berth and bunkering facilities for product discharge and fishing fleet bunkers bearing in mind the latter's high percentage of the total oil market potential.
(c) The naturally well entrenched advantages SOCAL enjoy as sole marketer in American Samoa.
(d) The importance of our probable gain of a major airlines business, once again because of the significance of aviation fuels in the Terri-

tory which together with the fishing business, aggregates almost ninety percent of your total petroleum market.

As the direct result of your efforts and co-operation you provided us with a solution to our land and wharf facilities. Again your receptiveness and to an extent, the coincidence of an anti trust suit against SOCAL, have combined to pave the way for our market entry proposal whilst your readiness to communicate directly with existing and potential airline operators followed on your realization of the significance of this trade. In full acknowledgement of these facts, our proposal seeks as integral components, your agreement to the following:—

(a) *A tax holiday* from the opening of our business in 1971 for a period of seven (7) years.

OR

A tax holiday for five (5) years on the basis that any accumulated trading loss still in existence at the completion of such five year period could continue to be carried forward for the purposes of tax considerations.

Our request in this regard is submitted under the terms of your Industrial Incentive Act Title XXVI, but it is in excess of the five (5) year consideration on which we exchanged communications during December and January. We are cognizant of potential tax ac-

commodation for a period of up to ten years but in seeking a lesser consideration have tried to balance your Government's legislative commercial goodwill with our economic necessity.

(b) *An initial period of contract for supplies of Diesel Fuel to your Electric Power Complex* at an acceptable improved price to the current level to be negotiated, but in line with price quotes already made to R.E.A. on our behalf by A.P.C. in New York. We would be interested in jointly developing a pipeline and storage programme with the R.E.A. [GAS] for their fuel supplies and for our projected wharf facilities to be designed accordingly. Storage tankage might be considered on either R.E.A. or Shell's projected land.

This request is made as we understand the R.E.A. intend to call tenders for supplies, and we are concerned less the timing of our entry should preclude us from the initial supply contract period.

OR

Alternatively agreement to "split" this business on a 50/50 basis between SOCAL and SHELL at no worse than the current price for a period of two years from our opening of business in 1971 after which the Government would go to open tender for period contracts of a minimum one (1) year and a maximum

three (3) years duration at least until the entrance of a third oil marketer.

OR

An alternative, better preferred by the Government, but with the objective of providing us a tangible product incentive on entrance in that the Government is the Territory's largest single customer.

Our reason for making the above request rests on the fact that we are aware that American Airlines have awarded their initial supply contract for aviation fuels to SOCAL. Whilst we believe we may be better placed to tender for this business—and for that matter other airline trade—in 1972, we will be committing capital with no guarantees, but rather on commercial judgement and associated inherent risks.

In being prepared to make US $1.5 million available for investment in American Samoa my Board has underlined its concern for the sensitivity of our venture to airlines business and government trade. An assurance on the Electricity Power House fuel supplies and indeed other government business would compensate for, and lessen the commercial risk impact of our investment.

This request is not designed to restrain the Government from obtaining the best deal for its future fuel supplies nor is it intended with disregard to normal expected competitive activity or "Anti Trust" Legislation. We are in fact accepting all the normal risks of entry in respect of airline, fishing, canning, industrial and retail trade.

POLICY

Shell Company (Pacific Islands) Limited would register in American Samoa, as such and in line with the requirements of your Corporation Law Sec. 11, 0123, plan to employ the following policies:

(a) *Price*

The fact that we have based our "entry programme" on anticipated economic assistance from your Government would indicate that our aim is to initially enter the market at no worse than equivalent prices to those currently experienced in the Territory. The only exception would be that earlier referred to in respect of your Power House requirements. In subsequent years we would anticipate that prices would find their appropriate levels arising out of normal oil industry competition in American Samoa.

(b) *Products*

We would aim to market a wide range of fuels and lubricants distributed in either bulk or packaged containers as supply and demand dictate. The quality of our products are of recognised international standards and at least the equivalent of the best produced by competitors in the Industry. There would be an educational and promotional programme associated with commencement of trading activity.

We would plan to introduce a range of agricultural chemicals during 1972.

(c) *Supply*

Our supply method will essentially represent an extension of the programme we have currently operating in the South West Pacific, in that our overseas tankers will originate from Singapore. Packed fuels, lubricants and chemicals may be supplied from Singapore, Australia or New Zealand depending on shipping advantages.

We would however seek your guidance and requirements on your preferred/required source of supplies for construction, materials, vehicles and any such equipment associated with our activities.

(d) *Customs*

Whilst we are naturally reasonably experienced in matters relating to customs and payments of duties etc., we wish to register that we would co-operate and comply with your requirements in this regard and again would welcome any guidelines you may wish to offer in this area. We have assumed excise duties as follows:

	US¢ per gallon
(1) Motor Gasoline	8.5
(2) Distillate	3.5
(3) Kerosine (household)	0.5
(4) Lubricants	15%

(e) *Standards*

We would implement standards of safety and quality control in respect of construction, distribution and products which currently meet recognised International standards and which we would expect to be in line with your local requirements.

TRADE

(a) *Retail*

We would propose establishing a retail network of outlets aimed at balancing our trade expectancy with the desirable limit of total Industry outlets in American Samoa. Our policy on sites and equipment will generally parallel the existing Industry pattern but in order to obtain some initial impact in this trade category, we would seek your agreement to lease "that triangular piece of land adjoining Utulei Motor Pool measuring 120 feet at the Motor Pool fence, 180 feet frontage to the main road, and 220 feet frontage of the secondary road branching from the main road opposite Burns Philp Utulei store" for the purpose of developing a major retail outlet. We would plan first class facilities for gasoline and oil sales as well as servicing and sale of appropriate motor vehicle spares.

We see the need to develop a retail image in line with the tourist development trends of the area and plans for this site would be submitted for your approval.

Additional retail outlets initially of a more moderate concept would be developed in association with appropriate local business concerns.

(b) *Aviation Business*

A substantial element of our projected investment relates to an expectancy of airline business. As indicated earlier we have not been successful, in an immediate sense, in gaining American Airlines business but are prepared to proceed in anticipation that we may place ourselves sufficiently competitively in 1972 to secure their business when it again becomes available for tender.

We would plan to install adequate storage for long term needs and install a separate line and hydrant system from SOCAL. However as mentioned earlier our planning pre-requires an up to the minute appreciation of projected airport layout and design modifications currently under study in American Samoa.

(c) *Fishing Industry*

We would plan to construct fuel outlets on our T wharf projection for the bunkering of

fishing vessels. In view of the nature of this facility we would feel, at this stage of the wharf development, that the wharf facility should be limited to the discharge of overseas tankers and the bunkering of fishing fleet or other vessels. Depending on future development of the facility, priorities would no doubt require review.

The availability of this wharf for bunkering facilities would ease the pressures on the existing oil/bunker discharge wharf on the opposite side of the harbour and thereby improve overall wharf usage within Pago Pago Harbour.
In the event that we gained some access to the canneries business we would again plan on utilization of pipeline supply from our storage area.

ADMINISTRATION PLANNING

(a) *Agency Matters—Burns Philp*

We would propose utilizing the agency services of Burns Philp with whom we have had some forty years of association in other areas of the Pacific, such as Western Samoa, Fiji, Tonga and Papua & New Guinea. Burns Philp have signified their willingness to act on our behalf on matters of shipping, customs, accounts and general administration and we would assume that you would have no objection to such an arrangement.

(b) *Staffing*

As previously indicated and in line with our policy in Pacific national areas, we will train, develop and utilize local Samoan staff for our trading needs. We will require to place a non American Samoan into Pago Pago as Manager, but the employment of local staff for clerical, driving, storage and packing is integral to our planning.

In the anticipation we may be successful in gaining airlines business, we would temporarily require to locate a non American Samoan at Tafuna but inherent in this arrangement would be a training scheme enabling Samoan staff to be trained in Fiji or Australia and in Pago Pago. We would however like your formal approval in this regard and advice on requirements for permits of entry and taxation for non indigenous staff.

We would plan for our total complex to be managed and operated by Samoan nationals when the time is considered mutually desirable and acceptable.

(c) *Housing*

We have built into our plan the provision of a suitable home for our Pago Pago Manager and this is intended to be incorporated with projected Burns Philp staff housing development

out near Tafuna. Beyond this we would not expect involvement with housing for local staff.

(d) *Legal*

To date we have been extended admirable legal co-operation by your Attorney General and in particular Mr. M. Gillette. We would expect to have need for local representation and would respectfully seek your views on the course we might take.

(e) *Remittances*

We have assumed no restraint as remittance of monies from American Samoa and Burns Philp would act on our behalf.

We trust the foregoing is essentially consistent with our earlier negotiations and look forward to your formal acceptance of our proposal in line with the terms presented. Again our sincere thanks for your co-operation.

Yours faithfully,

/s/ R. K. GOSPER
ISLANDS MANAGER
For L. T. FROGGATT

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LT GOVERNOR JOHN M HAYDON
Pago-Pago

CONFIDENTIAL ONE COINCIDING WITH ARRIVAL YOUR CABLE 15/1 WE HAVE BEEN ADVISED ON PROGRESS IN NEGOTIATIONS BETWEEN OUR ASSOCIATE COMPANY IN NEW YORK ASIATIC PETROLEUM AND SOCAL, STOP FOR YOUR INFORMATION SOCAL HAVE ADVISED THAT UNDER NORMAL CIRCUMSTANCES THEY WOULD FULLY EXPLORE ECONOMIS OF SHELLS PROPOSAL HOWEVER AS THEY PRESENTLY DEFENDING ANTI TRUST SUIT FILED BY GOVERNMENT WHICH CHALLENGES LEGALITY OF THEIR SAMOAN OPERATION THEIR ATTORNEYS REQUEST THEY NOT CONSIDER SHELL PROPOSAL UNTIL CASE CONCLUDED, SOCAL ARE NATURALLY CONSTRAINED TO OBSERVE THIS ADVICE EVEN THOUGH THEY HAVE GENUINELY INDICATED WILLINGNESS TO CONSIDER JOINT VENTURE, TWO IT SEEMS REGRETTABLE THAT THE ANTI TRUST SUIT SCHEDULED FOR HEARING IN JUNE APPEARS THE MAIN PREVENTATIVE TO OUR NEGOTIATING ENTRY INTO AMERICAN SAMOA IN ASSOCIATION WITH SOCAL. STOP HOWEVER IT OCCURS TO US THAT IF YOU WERE PREPARED TO COMMUNICATE TO

YOUR DEPARTMENT OF COMMERCE IN NEW YORK THE PROSPECT OF AN ARRANGEMENT BETWEEN OUR TWO COMPANIES WHICH WOULD ALLOW FOR THE EXISTENCE OF A COMPETITIVE MARKET SITUATION EITHER EXPEDITE THE HEARING OR EVEN RECONSIDER WHETHER UNDER THE CIRCUMSTANCES GROUNDS FOR THEIR CASE AGAINST SOCAL WOULD CONTINUE TO EXIST, THREE IN VIEW OF THE RECEPTIONESS OF SOCAL TO THE POSSIBILITIES OF THE JOINT CONCEPT AS DISCUSSED WITH YOU WE ARE NATURALLY CONTINUING TO PLAN ON POTENTIAL ENTRY, HOWEVER WHILST SOCALS LEGAL SUIT CONTINUES TO PREVENT DETAILED DISCUSSION AND PLANNING WE ARE UNCERTAIN TO WHAT EXTENT LAND SPACE ABOVE AND ADJACENT TO THE FISHERIES.

(PAGE TWO)

LT GOVERNOR

MAY BE NEEDED IN YOURS AS WELL AS THE OIL INDUSTRYS INTEREST, FOR FROM OUR UNDERSTANDING THE FISHING INDUSTRIES MAIN CONCERN WITH LAND RELATES TO WATERFRONT AND THEIR NEED CAN BE MET WITHOUT FORFEITING TOTAL LAND OPPORTUNITY FOR FUTURE POSSIBLE OIL STORAGE NEEDS, FIVE COULD YOU KINDLY

CONVEY YOUR OPINION ON THE AFORE-GOING AND IN PARTICULAR ADVISE YOUR WILLINGNESS TO COMMUNICATE WITH YOUR DEPARTMENT OF COMMERCE AS SUGGESTED IN PARA TWO

Regards

Kevin Gosper Careshell

ADDENDUM F

United States v. *Standard Oil Company of California*
N.D. Cal., Civ. No. 52334-SC

pages 153-154

Deposition of Raymond C. Turnbull, Oct. 1, 1970
Direct Examination by Mr. Mussman:

[Referring to DDX 114, set out in Appellant's Appendix, pp. 44-45]

Q. The next paragraph, the fourth paragraph, you say, "To backstop all the petroleum capers that I am working on for you, I had talked to Asiatic Petroleum." Do you see that?

A. Yes.

Q. Do you recall discussing the petroleum deal with Asiatic Petroleum?

A. That's—Asiatic Petroleum and Summit Industrial are one and the same, or one of the subsidiaries.

Q. I see Asiatic Petroleum.

A. It is the Thailand Division of Summit Industrial Corporation.

Q. I thought Asiatic Petroleum was a subsidiary of Shell Oil Company. You aren't thinking of Oceanic Petroleum, are you?

A. I'm sorry, that's part of Summit, isn't it?

Q. I take it from later documents.

A. I wonder if there was—if I put the wrong word in this, and I'll tell you why. Because—Asiatic Petroleum is controlled by whom?

Q. I think it's a subsidiary of Shell Oil Company, Royal Dutch Shell. I'm not going to represent that as being absolute truth.

A. As I told you before, I was in contact with the Shell in Australia and the Shell in Western Samoa. Now, I don't know where this fits, if I used the correct word, Asiatic Petroleum.

Q. Does that name mean anything to you, Mr. Galeon?

A. It sure as hell doesn't.

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Q. Does the fact that you had to go to London mean anything to you?

A. Well, it sounds frightfully British.

Q. Well, you just don't recall the contact; is that right?

A. I really don't, at the moment. This would have had—I can—when I read the whole paragraph, I can see then I must have known that it was Shell. The inexorable forces of time have slowed my wit, because I indicate here the two western officials were interested only in price. I did have discussions with them in Western Samoa.

Q. The next sentence in that you say, "At the present time I believe the company that quoted the prices I gave to you will be interested in financing the whole marketing feature in Pago," and so forth. Do you see that?

A. Yes.

Q. Were you referring to Summit there?

A. That could have been. We discussed that phase of it, and then I backed away from that and said he would prefer just to submit it on a CIF basis.

* * * * *

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